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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 663

ANNE C. SKEELES, ADMINISTRATRIX OF ESTATE OF WILLIAM E. SKEELES, DECEASED

AND

ANNE C. SKEELES

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT A. LITTLETON,
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vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled proceedings.

Opinion Below

The special findings of fact, conclusion of law, and opinion promulgated by the United States Court of Claims herein are found at pages 10 to 13 et seq. of the record.

Jurisdiction

The judgment of the Court below was entered February 6, 1951 (R. 21). Jurisdiction of this Court is invoked under the provisions of Section 1255 (Title 28 USCA) (62 Stat. 928).

Question Presented

Does Subsection (h) of Section 23 of the Internal Revenue Code, which deals primarily and specifically with the allowance of unavoidable "wagering loss" not connected with a "trade or business" and/or not "incurred in a transaction entered into for profit," limit and/or narrow the meaning of Subsection (e) (1) of the same Section with respect to the allowance of unavoidable losses incurred in a "trade or business" carried on for profit?

Statutes Involved

Section 122 of the Internal Revenue Code reads as follows:

"(a) *Definition of Net Operating Loss.*—As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

"(b) *Amount of Carry-back and Carry-over.*

(1) Net operating loss carry-back.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by

determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) Net operating loss carry-over.—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable years shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year.

(c) *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4), exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, normal-tax net income (computed without such deduction and without the credit provided in section 26(e)).

(d) *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114 (b) (2), (3), or (4);

(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23(b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

(3) No net operating loss deduction shall be allowed;

(4) Gains and losses from sales or exchanges of capital assets shall be taken into account with regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains.

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph, deductions and gross income shall be computed with the exceptions, additions, and limitations specified in paragraphs (1) to (4) of this subsection."

Sections 23(e) (1) and (2), (h) and (s) read as follows:

"In computing net income there shall be allowed as deductions:

* * * * *

"(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *"

* * * * *

(h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

* * * * *

(s) *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122."

Statement

1. In case No. 48838, Anne C. Skeeles, the petitioner, is the duly appointed and qualified administratrix of the estate of William E. Skeeles, deceased. William E. Skeeles died on the 10th day of July, 1947, and at the time of his death, he was a citizen of the United States residing in Shreveport, Louisiana.

2. In case No. 48839, the petitioner Anne C. Skeeles brings suit in her individual right. She is the surviving wife of William E. Skeeles, and during the lifetime of William E. Skeeles separate returns of community income were filed. Anne C. Skeeles is a citizen of the United States and resides in Shreveport, Louisiana.

3. Anne C. and William E. Skeeles were married in 1936, and lived together as a married couple until the death of the husband. From 1936 to his death, William E. Skeeles was engaged in gambling and wagering transactions, and during the years 1940, 1941 and 1942, the sole source of income of William E. Skeeles and Anne C. Skeeles was the husband's gambling and wagering transactions, conducted for his own account and with others, on the outcome of horse racing, football and baseball games, prize fights, card and dice games. William E. Skeeles sometimes participated personally and other times selected someone to play in the card games, in which event he either partially or completely backed such player with funds for the game. All these activities were conducted by Mr. Skeeles for the purpose of profit, at a fixed location in the City of Shreveport, Louisiana, and they were in violation of the ordinances of the City and the laws of the State.

4. William E. Skeeles and his wife Anne C. Skeeles duly and regularly filed Federal income tax returns, to which returns there were attached schedules showing the source of the income, the deductions and net income and/or loss. For the year 1940 the returns showed a community net loss, which was later determined to be $12,200.69, which amount was the excess of gambling losses over gambling gains in that year. The returns for 1941 showed a community net income, after a deduction of the net loss for 1940 which was claimed in the return. The community net income was determined to be $83,674.29, after the claimed 1940 net loss deduction was denied. For the year 1942, the returns showed a community net loss which was later determined to be $66,570.98, which amount was the excess of gambling losses over gambling gains in that year. In connection with the returns for 1942, William E. Skeeles and Anne C. Skeeles each filed, on May 3, 1943, a claim for refund for

the year 1941, "Based on the new section of the law, Section 122 I.R.C. providing for a carry-back of 1942 net operating loss deduction to 1941 net operating gains." These claims were rejected, and the disallowance notices were dated January 29, 1947.

5. The Commissioner of Internal Revenue, by reason of the disallowance of the deduction from 1941 income of the 1940 net loss, asserted deficiencies for 1941 of $3,048.46 against William E. Skeeles, and $3,048.45 against Anne C. Skeeles. The tax for 1941, including the deficiencies, with interest of $828.09 on each deficiency, was paid as follows:

	Date Paid	*Amount*
William E. Skeeles:		
	March 16, 1942	$13,097.75
	January 4, 1949	795.00
	April 27, 1949	3,081.55
Anne C. Skeeles:		
	March 16, 1942	13,097.75
	December 12, 1946	600.00
	January 28, 1947	500.00
	March 3, 1947	500.00
	April 28, 1947	500.00
	July 9, 1947	500.00
	November 26, 1948	1,000.00
	December 2, 1948	276.54

6. Under date of November 3, 1947, Anne C. Skeeles as administratrix of the estate of William E. Skeeles, filed a claim for refund of the taxes paid by her deceased husband for the year 1941, claiming a right to deduct from 1941 income the net loss sustained in 1940. On the same date Anne C. Skeeles filed a similar claim on her own behalf. No action has been taken on these claims for refund by the Commissioner of Internal Revenue.

Points Relied Upon

(1) Subsection (h) of Section 23 of the Code deals specifically with the allowance of unavoidable "wagering losses" (whether or not incurred in transactions

entered into for profit, and/or whether or not legally enforceable) to the extent of gains realized from like transactions.

(2) Whereas, Subsection (e)(1) of the same Section deals with the allowance of unavoidable "business losses"; so that

(3) With respect to the allowance of an unavoidable "net business loss" for one year as a deduction from a "net business profit" for another year, Subsection (s) of Section 23 is controlling.

(4) Section 122(d)(1) to (5), inclusive, of the Internal Revenue Code prescribes the limitations with regard to the determination of a "net business loss" incurred in a "trade or business regularly carried on by the taxpayer"; and in doing so, gives full effect to the limitations of Subsections (e)(2) and (h) of Section 23 with respect to deductions not attributable to "trade or business" and/or gains not derived from such "trade or business."

Reasons for Granting Writ

(1) In the case of *Jennings et al* vs. *Commissioner,* 110 Fed. (2d) 945, it is held that where two or more persons conduct a trade or business of "wagering" in partnership form, the "net profit" realized and/or the "net loss" sustained by the partnership is determinable by the application of Subsection (e)(1) of Section 23 of the Code. (See Sections 181, 182 and 183 of the Code.)

(2) That the net profits and/or net losses of the trade or business of the partnership must be taken into account in computing tax liability of each partner; and

(3) Even though the "trade or business" of the partnership be that of "making wagers," a member of the partnership who sustains "wagering losses" and/or realizes "wagering gains" (incurred and/or realized in transactions entered into *aliunde* the "trade or business" of the partnership) may use his share of the "net profits" of the

partnership to reduce his individual "wagering loss" and/or his share of the "net loss" of the partnership to reduce his individual "wagering gain". (See *Neuberger* vs. *Commissioner,* 311 U.S. 83) Therefore, in the light of the *Neuberger* and *Jennings* cases, the underlying philosophy of the judgment of the Court in this proceeding creates confusion in the application of Subsection (h) of Section 23 with respect to the business form in which "wagering transactions" may be carried on as a "trade or business" within the meaning of Section 23(e)(1) of the Code and/or may be entered into for sport, for entertainment, or for profit within the meaning of Section 23(e)(2) of the Code.

(4) Subsection (h) of Section 23 may properly be construed as an enlargement of paragraph (2) of Subsection (e) of Section 23, with respect to the type of "losses incurred in transactions entered into for profit, though not connected with the trade or business"; but if Subsection (h) of Section 23 be construed to limit the meaning of paragraph (1) of Subsection (e) of Section 23, with respect to "losses incurred in a trade or business", the decision of the Court in this proceeding appears to be in conflict with the cases of *Jennings et al* vs. *Commissioner, supra,* and *Humphrey* vs. *Commissioner,* 162 Fed. (2d) 853.

(5) The cases of *Clifford F. MacEvoy Company* vs. *United States,* 322 U. S. 102; *D. Ginsburg & Sons, Inc.* vs. *Popkins,* 285 U. S. 204; *Rodgers* vs. *United States,* 185 U. S. 83; and *Townsend* vs. *Little,* 109 U. S. 504, do not establish the principle that "business losses" as defined by Subsection (e)(1) of Section 23 may be classed as "private and/or non-business losses" as defined by paragraph (2) of Subsection (e) of Section 23. (See *Johnson* vs. *Commissioner,* 86 Fed. (2d) 732)

(6) In the case of a "trade or business" involving "wagering transactions" (when conducted in partnership

form) owners thereof may—under the philosophy of the judgment in this case—hedge against anticipated "business loss" of the partnership within the meaning of Section 23(e)(1) by the utility of Section (e)(2), as modified by Section 23(h). (See *Neuberger* vs. *Commissioner, supra*)

(7) Rather than have the provisions of Section 23(h) of the Code construed so broadly as proposed by the Court in this proceeding and/or the case of *Humphrey* vs. *Commissioner, supra,* it would appear more logical to recognize the application of Section 23(e)(1) with respect to the "net business losses" of the "trade or business" of taxpayer for the years 1940 and 1941. (See *Jennings et al.* vs. *Commissioner,* and *Neuberger* vs. *Commissioner, supra*)

(8) In the case of "wagering transactions" being the "trade or business" of a taxpayer (within the meaning of Section 23(e)(1) of the Code) the application of Subsection (s) of Section 23 for offsetting "wagering gains" for one year against "wagering losses" for another year, is not contrary to the letter, spirit and/or purpose of Subsection (h) of Section 23. (See *Jennings et al.* vs. *Commissioner,* and *Neuberger vs. Commissioner, supra*)

(9) In the computation of a net loss of a "trade or business", contemplated by the provisions of Section 122(b)(1) and (2), the provisions of Subsections (d)(1), (2), (3), (4), and (5) prescribe the limitations with respect to the allowance of deductions "not attributable to the trade or business regularly carried on by the taxpayer", within the meaning of Section 23(e)(2) as modified by Section 23(h).

(10) There is no dispute with respect to the "net losses" of the trade or business of the taxpayer in this proceeding, for the years 1940 and 1942; their allowance to offset "net profits" for the year 1941 is within the letter, spirit and purpose of Section 23(h), and inasmuch as there is no con-

flict between the meaning, purpose and spirit of Subsections (h) and (s) of Section 23, it would appear that the judgment of the Court in this proceeding is directly in conflict with the cases of *Jennings et al.* vs. *Commissioner,* and *Neuberger* vs. *Commissioner, supra.*

(11) With respect to the allowance of "net losses" as an offset against "net gains" of a trade or business, (within the meaning of Section 23(s)), the provisions of Section 23(h) may not be distinguished in purpose from the provisions of Section 23(g). Therefore, in the sense that a capital "net loss" is allowable as a carry-over within the meaning of Section 117(e), it would appear that Section 23(s) has the same effect with respect to the carry-over or carry-back of a trade or business net loss within the meaning of Section 23(e)(1), as enlarged and/or restricted by Section 23(h). (See *Jennings et al.* vs. *Commissioner,* and *Neuberger* vs. *Commissioner, supra*)

(12) In the sense that Section 23(h) is construed to modify 23(e)(1), with respect to the allowance of "wagering loss" when incurred in a trade or business, as well as Section 23(e)(2) with respect to the allowance of "wagering losses" when incurred in a transaction not connected with a trade or business; it would appear that the provisions of Section 23(s) are mandatory with regard to the allowance of "wagering losses" incurred in a trade or business and not compensated for by "wagering gains" incurred in transactions not connected with a trade or business. (See *Jennings et al.* vs. *Commissioner; Neuberger* vs. *Commissioner;* and *Humphrey* vs. *Commissioner, supra*)

(13) It appears to be the purpose of Congress to allow "wagering losses" in any category of the law that they may qualify to offset "wagering gains"—irrespective of the legality or illegality of the trade or business and/or

transactions in which incurred—and in that tenor of Section 23(h) of the Code, it does not limit and/or conflict with the meaning of Section 23(e)(1)—as applied by this Court in the case of *Neuberger* vs. *Commissioner, supra*—so as to resolve the conflict in the cases of *Johnson* vs. *Commissioner* and *Jennings* vs. *Commissioner, supra*. However, when the philosophy of the judgments of the Court in this proceeding is squared with the principles of the cases of *Neuberger* vs. *Commissioner* and *Jennings* vs. *Commissioner, supra,* a conflict in the application of Section 23(e)(1) is reestablished with such a manifest degree of confusion that the decision in the case of *Humphrey* vs. *Commissioner, supra,* appears misleading from the standpoint of the true and proper intent of Congress as expressed by Section 23(h) of the Code.

(14) It would appear that in the case of *Jennings* vs. *Commissioner, supra,* "wagering transactions" may constitute the "trade or business" of a partnership; that the "net income" and/or "net loss" of a partnership is to be computed in the same manner that the "net income" and/or "net loss" of an individual is computed; that a net loss incurred in the trade or business of a wagering partnership is allowable (within the meaning of Section 23(e)(1)) as an offset against "wagering gains" of partners; but, in the case of the trade or business of an individual it is the judgment of the Court in these proceedings that net losses incurred in wagering transactions for one year may not be allowed to offset wagering gains for another year (within the meaning of Section 122(a), (b) and (d) as provided by Section 23(s)).

(15) It does not appear logical to say that the words used by Congress to express the purpose of Section 23(h) are to be construed as a limitation on the meaning of Section 23(e)(1), when the trade or business of wagering is conducted

individually; but not to be so applied when the trade or business of wagering is conducted by two or more individual persons in partnership form. The distinction is without a difference; and the conflict that appears between the judgment in this proceeding and the decision in *Jennings* v. *Commissioner, supra,* confuses the purpose of Section 23(h) as a modification of Section 23(e)(1). The purpose of Section 23(h) was not to stop an evil with respect to wagering transactions when carried on as a "trade or business", but rather to establish a policy of Congress with respect to the allowance of losses incurred in connection with wagering transactions when not incurred in a "trade or business" and/or not incurred in a "transaction entered into for profit". (See *Humphrey* v. *Commissioner, supra.*)

(16) The judgment of the Court in this proceeding appears to concede that the term "wagering losses" as used in Section 23(h) is within the meaning of Section 23(e)(1), when incurred in the "trade or business" of wagering; but with respect to the allowance thereof, the meaning it attributes to Section 23(h) must be subtracted from the commonly accepted meaning of Section 23(e)(1). The result is that the allowance of "losses" as provided by Section 23(e)(1) is limited to "gains" of the "trade or business" in which the losses were incurred. It appears strange that the Court below may change the commonly accepted meaning of Section 23(e)(1) by arbitrarily deleting from the term "losses" as used therein the meaning it attributes to the term "losses" as used in Section 23(h).

(17) Even though the provisions of Section 23(h) may be construed as an *enlargement* of the meaning of Section 23(e)(2)—as decided in the case of *Humphrey* vs. *Commissioner, supra*—an attempt to construe the meaning of the language of Section 23(h) to be a *restriction* on the

meaning of Section 23(e)(1) and (s) appears to go beyond the purpose of Congress by the adoption of Section 23(h). (See *Jennings* vs. *Commissioner, supra.*)

Prayer for Writ

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court directed to the United States Court of Claims commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a transcript of the record and proceedings herein. Your petitioner further prays that the judgment of the United States Court of Claims be reversed by this Honorable Court and that petitioner have such other and further relief in the premises as to this Honorable Court may seem met and just.

Dated this 6th day of April, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 663

ANNE C. SKEELES, ADMINISTRATRIX OF ESTATE OF WILLIAM E. SKEELES, DECEASED, AND ANNE C. SKEELES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 10-21) is reported at 95 F. Supp. 242.

JURISDICTION

The judgment of the court below was entered on February 6, 1951 (R. 21). The petition for a writ of certiorari was filed on April 6, 1951. The juris-

diction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether losses from wagering transactions in excess of the gains from such transactions can be net operating losses within the meaning of that term in Section 122(a) of the Internal Revenue Code, which, under subsection (b), can be carried over or carried back and allowed as deductions in computing taxable income in the succeeding or preceding year.

STATUTES INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, *infra,* pp. 9-12.

STATEMENT

The special findings of fact of the Court of Claims (R. 10-12) may be summarized as follows:

The petitioner, Anne C. Skeeles, instituted one suit as the administratrix of the estate of William E. Skeeles, deceased, and another suit in her individual capacity. She is the surviving wife of William E. Skeeles who died on July 10, 1947. During the lifetime of William E. Skeeles, separate returns of community income were filed by him and his wife. (R. 10-11.)

From 1936 to his death, William E. Skeeles was engaged in gambling and wagering transactions, and during the years 1940, 1941 and 1942, his sole source of income and that of his wife was from his

gambling and wagering transactions, conducted for his own account and with others, on the outcome of horse racing, football and baseball games, prize fights, card and dice games. All of these activities were conducted by Mr. Skeeles for the purpose of profit, but they were in violation of the ordinances of the city of Shreveport, Louisiana and the laws of that state. (R. 11.)

William E. Skeeles and his wife filed federal income tax returns on the community property basis, to which returns there were attached schedules showing the source of income, the deductions and net income or loss. For the year 1940, a net loss of $12,200.69 was determined, which amount was the excess of gambling losses over gambling gains in that year. For the year 1941, the gambling gains in excess of the gambling losses were determined to be $83,674.29, after the claimed 1940 net loss deduction was denied. For the year 1942, a community net loss was determined of $66,570.98, which was the excess of gambling losses over gambling gains for that year.

William E. Skeeles and his wife each filed a claim for refund for the year 1941, claiming thereon that they were entitled to a carry-back of the 1942 net operating loss and to apply it as a deduction to 1941 net operating gains under Section 122 of the Internal Revenue Code. These claims were rejected and the disallowance notices were dated January 29, 1947. (R. 11-12.)

By reason of the disallowance of the deduction from 1941 income of the 1940 net wagering losses, the Commissioner of Internal Revenue determined deficiencies against William E. Skeeles and Anne C. Skeeles which were subsequently paid. Under date of November 3, 1947, Anne C. Skeeles, as administratrix of the estate of William E. Skeeles, filed a claim for refund of taxes paid by her deceased husband for the year 1941, claiming a right to deduct from 1941 income the net loss sustained in 1940. On the same date, she filed a similar claim on her own behalf. (R. 12.)

No action having been taken by the Commissioner on these claims (R. 12), suit was filed in the Court of Claims (R. 1-9). That Court, on February 6, 1951, found petitioner not entitled to recover and dismissed her petitions (R. 21).

ARGUMENT

1. To be entitled to a "carry-back" or "carry-over" under Section 122(b) of the Internal Revenue Code, a taxpayer must establish that he has a "net operating loss" within the meaning of Section 122(a). See Appendix, *infra,* p. 10. Section 122(a) defines "net operating loss" as "the excess of the deductions *allowed* by this chapter over the gross income * * *". [Italics supplied]. And so the question that must be put is whether wagering losses in excess of wagering gains are "deductions allowed".

Section 23(h) supplies a clear answer to that question. It specifically states that "Losses from wagering transactions shall be *allowed* only to the extent of the gains from such transactions." [Italics supplied.] Hence the Court of Claims was plainly correct in denying the "carry-backs" and "carry-overs" here sought.

2. To contend, as petitioner does, that wagering, having been Mr. Skeeles' sole income-producing activity in 1940-1942, was his trade or business, and that losses therefrom are deductible under Section 23(e) (Appendix, *infra,* p. 9) is to frustrate the effectiveness of Section 23(h) with respect to taxpayers whose sole activity is gambling. Moreover, Congress, in Section 23(h), drew no distinction between amateur or professional and full-time wagering. On the contrary, the history of Section 23(h) demonstrates a Congressional purpose to gather all wagering transactions into a class of their own in order to determine the extent to which wagering losses shall be deductible.

The Revenue Acts, prior to the year 1934, contained no specific provisions dealing exclusively with the allowance or disallowance as deductions from taxable income of losses sustained from wagering transactions. Prior to 1934, the Board of Tax Appeals decided that, under the provisions allowing deduction for losses sustained in transactions entered into for profit, illegal wagering losses could be taken as a deduction to the extent

of gains from such transactions. *Simms* v. *Commissioner,* 28 B.T.A. 988; *Frey* v. *Commissioner,* 1 B.T.A. 338; *McKenna* v. *Commissioner,* 1 B.T.A. 326. However, it had been ruled that losses from legalized wagering were deductible in full provided such wagering was entered into for profit. G.C.M. 10873, XI-2 Cum. Bull. 85 (1932); S.M. 2680, III-2 Cum. Bull. 110 (1924); I.T. 1865, II-2 Cum. Bull. 125 (1923). See also *Beaumont* v. *Helvering,* 73 F. 2d 110 (C.A. D.C.), certiorari denied, 294 U.S. 715; *Cronan* v. *Commissioner,* 33 B.T.A. 668.

In the Revenue Act of 1934, Congress inserted a new provision (Section 23(g), now Section 23(h) of the Internal Revenue Code, Appendix, *infra,* pp. 11-12) to the effect that losses from wagering transactions shall be allowed only to the extent of gains from such transactions. The primary reason for the addition of this new provision was to limit deductions for losses from legalized wagering and to permit the deduction of such losses only to the extent of gains from such transactions, thus placing the deductibility of such losses on the same plane as the deductibility for illegal wagering. H. Rep. No. 704, 73d Cong., 2d Sess., p. 22 (1939-1 Cum. Bull. (Part 2) 554, 570) copied in the footnote at pages 19 and 20 of the Record.

Moreover, Section 23(e)(1) is a general clause in the Internal Revenue Code providing for business losses generally by an individual, whereas Section 23(h) is a special clause providing for

wagering transactions specifically. It is a well-established rule of interpretation that the special statute limits the general. *Clifford F. MacEvoy Co.* v. *United States,* 322 U.S. 102; *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204; *Rodgers* v. *United States,* 185 U.S. 83. Also, where two provisions in the same statute give rise to doubt, or are in any way conflicting, the doubt will be resolved in favor of the later expression. *Reynolds* v. *United States,* 95 C. Cls. 160.

3. Petitioner refers the Court to, and we have been unable to find, no other case in which the issue was whether wagering could constitute a "trade or business" under Section 23(e)(1) or any like provision of law. Hence, there can be no conflict of decisions. In both *Neuberger* v. *Commissioner,* 311 U. S. 83 (not a wagering case at all), and *Jennings* v. *Commissioner,* 110 F. 2d 945 (C.A. 5), it was held only that losses sustained by the taxpayers in their individual capacity were allowable as deductions to the extent of their proportionate share of gains from like transactions by the partnership of which they were members. It was stated in the opinions that under the federal taxing Acts a partnership is merely an income computing unit and not a separate taxable entity such as a corporation, and that partnership income is reportable as the individual income of the partners thereof.

In *Humphrey* v. *Commissioner,* 162 F. 2d 853 (C.A. 5), the court held that all wagering trans-

actions were gathered into a class of their own under Section 23(h) of the Code and were dealt with as provided by such subsection. That the court below followed the decision of the Fifth Circuit is evident by its statement (R. 20), "We feel that the quotation from the opinion of the majority in the *Humphrey* case, *supra,* correctly states the law".

CONCLUSION

The judgment of the court below is correct, there is no conflict, and no other reason for review by this Court. Hence, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1951.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

* * * * *

(h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

* * * * *

(s) [as added by Section 211(a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 122 [as added by Sec. 211(b), Revenue Act of 1939, c. 247, 53 Stat. 862]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) [as amended by Sec. 153(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Amount of Carry-back and Carry-over.*—

(1) *Net Operating Loss Carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) *Net Operating Loss Carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall

be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

* * * * *

(26 U.S.C. 1946 ed., Sec. 122.)

Revenue Act of 1934, c. 277, 48 Stat. 680, 688:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(g) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

* * * * *

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